In the Australian case of *Butler* v. *Fairclough*[8] reference may be made to a passage by Griffith C.J. who expressed similar sentiments:

"... In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice. Thus, if an equitable mortgagee of lands allows the mortgagor to retain possession of the title deeds, a person dealing with the mortgagor on the faith of that possession is entitled to priority in the absence of special circumstances to account for it."

In *Syed Ibrahim bin Syed Abdul Rahman* v. *Liew Su Chin*[9] the Federal Court made clear that:

"... It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet Judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible. As Lord Diplock said in *Eng Mee Yong's* case at page 217:

'... In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to meet further investigation as to their truth. Since this is a matter upon which the opinion of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under section 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong.' "

The submission of the 4th respondent that he has better equity is well founded. He entered into the sale agreement with the vendors first. He had paid the full purchase price. The vendors had executed the Memorandum of Transfer in his favour. Also, most important the title deed is in his possession. He had become the beneficial owner. The only thing against him is that he entered the caveat later than the appellant. However, we are satisfied that on the facts he has the better equity.

We cannot say the learned Judge was wrong in the order he made in the circumstances. The appellant has not been able to persuade us to interfere with the decision of the learned Judge. Accordingly, we would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Yusuf Lee Pathma & Marbeck; Ngan & Chen.*

GUNUNG BAYU SDN. BHD. v. SYARIKAT PEMBINAAN PERLIS SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C.JJ.) September 17, 1986 & February 27, 1987]

[Kuala Lumpur – Supreme Court Civil Appeals Nos. 16 and 32 of 1985]

Practice and Procedure – Summary judgment – Building contract – Certificate of architect – Whether matter should be dealt with by arbitration – Triable issues – R.H.C. 1980, O. 14.

Contract – Building contract – Certificate of architect – Whether valid certificate – Certificate signed by unregistered architect.

Architect – Whether graduate architect who has not been registered entitled to sign certificate – Architects Act, 1967, ss. 2, 7 & 10.

The appellants had entered into a building contract with the respondents, a firm of building contractors for the construction of a housing scheme. The contract provided for progress payments to be made based on interim certificates to be issued by the appellant's architect who was Hajjas Kasturi Associates Sdn. Bhd. The contract also contained the usual arbitration clause. The work proceeded and interim certificates were issued for work done. These were signed by a graduate architect who had not been registered. The appellants refused to honour the certificates and the respondents terminated the contract and filed a writ against the appellants. The appellants applied to have the writ struck out on the ground that under the agreement the parties have agreed to go to arbitration in the event of "any dispute or difference." This application was heard and dismissed.

The respondents then applied for summary judgment on the sums due on the interim certificates. The appellants applied for a stay of the respondents' application for summary judgment pending the outcome of their appeal against the dismissal of the application to strike out the respondents' writ.

The learned Judge gave judgment in favour of the respondents and the appellant appealed. On the appeal it was argued (1) that this was not a proper case for summary judgment and (2) that, if not, the matter should go to arbitration.

Held: (1) there appears to be a plenitude of triable issues in this case. It is trite law that leave to defend must be given unless it is clear that there is no real substantial question to be tried or unless there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment;

(2) the appeal is allowed and by consent the parties will submit their dispute to arbitration.

Cases referred to:

(1) *Mottram Consultants Ltd.* v. *Bernard Sunley & Sons Ltd.* [1975] 2 Lloyd's Rep. 197.
(2) *Codd* v. *Delap* (1905) 92 L.T. 510.

SUPREME COURT.

Dato Peter Mooney (*Van Buerle* with him) for the appellants.

Mahinder Singh Dulku for the respondents.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the Judgment of the Court): The appellants Gunung Bayu Sdn. Bhd. were the defendants in the Court below (in High Court Alor Star Civil Suit No. 461 of 1984). They had entered into a building contract with the respondents/plaintiffs (Syarikat Pembinaan Perlis Sdn. Bhd.), a firm of Building Contractors, for the construction of a housing scheme called Taman Tunku Putra in Kulim, Kedah.

The architects named in the contract are Hijjas Kasturi Associates Sdn. who are specifically described therein as the appellants' architects. There was the usual provisions for periodic or progress payments based on interim certificates to be issued by the appellants' architects, and the times for honouring these certificates were also specified in the Appendix to the Agreement (one month and fourteen days respectively).

There was also the usual arbitration clause. Work proceeded apace and in due course 5 Interim Certificates were issued on the work done, duly signed by the architects. Appellants refused to honour these certificates. Respondents terminated the contract and filed a writ, and also applied for and was granted an injunction against appellants to restrain them from bringing other contractors onto the site, it being respondents' contention that they had substantially completed the project.

Appellants then applied by way of Summons-in-Chambers to have the writ struck out on the ground that under the Agreement (Clause 34) parties had agreed to go to arbitration in the event of "any dispute or difference." The application was heard and dismissed on January 6, 1985.

Next the respondents applied by Summons-in-Chambers for an Order 14 judgment on the sums due on the interim certificates. Appellants countered with a Summons-in-Chambers for a stay of the hearing of respondents' application for an Order 14 judgment, pending the outcome of appellants' appeal to this Court against the dismissal of their application to strike out respondents' writ.

These two applications were heard together by the learned Judge, and on February 22, 1985, appellants' application for stay was dismissed whilst respondents were allowed to enter summary judgment under O.14.

This appeal is therefore against both the above-mentioned decisions, and with the consent of counsel for the various parties were heard together.

Dato Peter Mooney for the appellants confined this appeal to two issues only *viz:*

(i) Is this a proper case for summary judgment; and

(ii) If *not,* should it be dealt with by the High Court or should it go to Arbitration?

Certain preliminary questions would, it was argued, have to be determined before an answer can be given for the main issues earlier referred to.

Para 4 of the Statement of Claim alleged that one of the terms of respondents' employment by the appellants/defendants was that the appellants should honour the Interim Certificates issued by his own architects within 14 days of presentation or alternatively within a reasonable time of such presentation.

Arising out of this, one of the questions is – Is such interim certificate issued by an unqualified architect a *valid* certificate? and secondly assuming such certificate is valid, is it to be regarded as a sort of cheque, regardless of whether work is well done, badly done or not done at all.

The Agreement (at page 16 of Civil Appeal No. 16/85) specifies that the term "the Architect" in the conditions annexed shall mean M/s Hijjas Kasturi Associates Sdn. *etc.*

Clause 30(1) reads as follows: "At the period of Interim Certificate named in the appendix to these Conditions the Architect shall issue a certificate stating the amount due to the Contractor from the Employer, and the Contractor shall, on presenting any such certificate to the Employer, is entitled to payment therefor within the period for honouring Certificates named in the appendix to these Conditions. Interim valuations shall be made whenever the Architect considers them to be necessary for the purpose of ascertaining the

amount to be stated as due in an Interim Certificate."

Dato Mooney emphasized that in Cl. 30(2), an Interim Certificate shall be the total value of the work *properly* executed.

Clause 30(7) sets out the circumstances when a Final Certificate shall be *conclusive* evidence that work had been properly carried out and,

Clause 30(8) states that except as set out in (7) no certificate of the Architect shall be conclusive evidence of such.

Referring lastly to the Clauses 34(1) and (3), it was argued that quite clearly the parties had relegated all disputes to arbitration.

The appellants are relying on Interim Certificates No. 1, 2 and 3 (on pages 21, 24 and 27 of Civil Appeal No. 32/85) which were signed by Mr. Gabriel Wong who was said to be a qualified architect (but a non-registered architect).

The respondents' managing director, Mr. Chew had (at P.51(ii) and P.53 in C.A. No. 32/85) stated in his affidavit that these Interim Certificates had never been validly questioned prior to the filing of the civil suit and so that there can be no valid dispute such as to bring clause 34 of the Agreement into operation. Further at page 55 (in same volume) he had added that wild and unsubstantiated allegations had been made against respondents/plaintiffs in respect of the quality of the work it had performed. Dato Peter Mooney's comment was that such allegations had been substantiated by high authority *i.e.* the consultants referred to on pages 64/65.

In short the appellants' case is contained in pages 59/60 of affidavit of their director Chan Fook Sing and can be summed up as follows:

(1) Certificates 1, 2 and 3 were signed by Gabriel Wong who is not a registered Architect under Architects Act, 1967, and even though certificate 5 was signed by Azman, the accompanying valuation, a part of its supporting document, was signed by the former.

(2) Terms of the contract specifically required an Architect from Messrs. Hijjas Kasturi Associates Sdn. who would be a partner to sign such certificates, and permit no delegation.

Our attention was also drawn to the fact that no attempt had been made to reply to appellants' affidavit.

Regarding the allegation in Chew's affidavit of January 21, 1985, that appellants' allegation against the certificates are mere after-thoughts as evidenced by the letter dated September 30, 1984, asking respondents/plaintiffs to confirm that a sum of $400,400.00 was due from appellants to them (page 104). Appellants' explanation was that it was inadvertently signed having been included among standard letters prepared by his auditors without reference to the appellants as to their correctness.

To support his contention that the signature of Mr. Wong made the three Interim Certificates invalid, we were referred to the Architects Act 1967.

Section 2 of the Act defines an "Architect" as a person registered under section 10(2). Dato Peter Mooney's contention is that Mr. Wong is not an "Architect" within the meaning given to that term in this Act and in the Agreement entered into between the parties, being merely an Architectural Graduate not having the experience required under section 10(2)(a)(ii) and 10(2)(b) to be registered under section A so that though he may be employed as an architect (small "a") by virtue of section (2), he cannot be a partner because of section 7(1). It was emphasized that section 7(1)(a) says that no person *unless* he is an Architect may –

"(a) practise or carry on business or take up employment as an architect under any name, style or title bearing the word "Architect" or the equivalent thereto in any other language or bearing any other word whatsoever in any language which may reasonably be construed to imply that he is an Architect."

We were also referred to page 92 of the 10th Edition of *Hudson's* Building & Engineering Contracts which goes as follows:

"In building contracts, while the use of qualified architectural assistants, who are permanent employees of the architect's firm is widespread in larger contracts, it is unusual to find their status in any way regulated by the contract documents, and they normally function merely as agents of the architect, though without any power vis-a-vis the contractor to discharge or carry out his many quasi-judicial duties under the contracts."

and at pages 149, 150 of the same book, the learned author said:

"Thus in the task of supervision the architect or engineer,

though he may be assisted by professional assistants or clerks of works or both, cannot escape responsibility, except perhaps in the smallest matters of detail, by delegation (unless the contract of employment so provides). He may make use of assistants, provided he retains control of the work and does not cease to exercise his own supervision and judgment. ..."

All these, submitted learned counsel, go to support his thesis regarding the importance of the interim certificates being signed by the "Architect" referred to in the Agreement and *not* by a mere "Graduate architect."

This contention appears to be further buttressed by another passage on pages 484, 485 of the same Work, under the heading "Who Is to Give the Certificate":

"A certificate, in the absence of any provision or implication to the contrary, can only be given by the person or persons designated in the contract (whether by name or description) ...

In many building contracts the certifier is named in the contract as an individual. If a firm is named, it is submitted that a certificate issued by a partner for and on behalf of the firm will satisfy the contractual requirement."

Another passage referred to is in the 8th Edition of *Emden's* Building Contracts & Practice at page 84 which states that "the certifying architect or engineer may make use of the work of others in collecting the information necessary to enable him to certify, but nevertheless the certificate is his and his alone."

Appellants' contention is thus threefold *viz.*

(1) Wong is not a registered architect;

(2) It is not permissible for him to sign on behalf of the firm; and

(3) Respondent cannot say that appellant is estopped from denying the validity of Wong's certificates.

As regards the Grounds of Judgment of the learned trial Judge, counsel has the following comments to make:

(a) The learned Judge was mistaken when he noted (at page 2 of the Grounds of Judgment) that the respondents had successfully applied for an injunction restraining the appellants from bringing in other contractors to replace them. Referring next to respondents' contention accepted by the Judge that appellants had $297,151.77 in retention money *etc.* in their custody, a sum adequate to cover any overvaluation by the architect, he countered that such sum was to cover defects subsequently found and was never meant to cover overpayment on interim certificates.

Finally learned counsel referred to that portion of the judgment which indicated that the learned trial Judge had been under the misapprehension that appellants had sacked their architects whereas in fact it was Wong whose services had been terminated. Hijjas Kasturi Associates, the Architects named in the Agreement, we have been assured, are still the appellants' Architects.

Mr. Dulku for respondents of course insists that Certificates 1, 2 and 3 are valid.

The contractor-respondent had gone into possession of the site about April 1984. About 6 months later on December 20, 1984, appellants had written to the Board of Architects a letter (C.A. No. 32 of 1985 page 69) inquiring whether Wong was a registered architect, and was informed by the Board (page 70) that he was a registered Architectural Graduate.

A firm registered under section 10(2) of the Architects Act 1967 would include, he argues a registered Architectural Graduate with practical experience, an argument which overlooks the requirement of section 10(2)(a)(iii) which has the additional requirement that he "is a Corporate Member of the Pertubuhan Akitek-Akitek Malaysia" or has obtained a qualification which the Board considers equivalent thereto.

Alternatively Mr. Dulku relies on section 7(2) which states that:

"Notwithstanding subsection (1), a registered Architectural Graduate may with the written approval of the Board take up employment as an Architect."

This provision enables Wong, he contends, to perform the function of an Architect, there being nothing to indicate that no permission had been so obtained. Besides, section 7A enables a Corporation, with the permission of the Board, such as Hijjas Kasturi Associates Sdn. to be named as Architect. All the interim certificates he emphasized had been issued by the latter and not by any natural person and taking the certificate No. 1 (page 21 in C.A. No. 32/85) as an example, which bore the Hijjas Kasturi Associates Sdn letterhead, were therefore in proper form and valid.

Mr. Dulku gave as his reason for not going to arbitration in the first place the House of Lords' decision in *Mottram Consultants Ltd.* v. *Bernard Sunley & Sons Ltd.*[1] Learned counsel appears to regard *Mottram's* case as a proposition for the rule that though overvaluation should be referred to arbitration, the amount set out in the certificate should however first be paid.

It appears to us that far from being a general proposition of law, *Mottram's* case was decided on its peculiar set of facts, and is not applicable here.

We do not feel that it would serve any useful purpose to examine each and every one of the numerous points which Mr. Dulku raised to support his contention that the Order 14 judgment should remain. The substance of his argument is that the interim certificates are valid, there is no suggestion that Mr. Wong is not qualified to act and certify under section 7(2) of the Architects Act 1967, and that the defence to respondents' application for an Order 14 judgment are mere allegations and afterthought.

What is clear to us is that there appears to be a plentitude of triable issues. It is trite law that leave to defend must be given unless it is clear that there is no real substantial question to be tried (*Codd* v. *Delap*)[2] or unless there is no dispute as to facts or law which raises a reasonable doubt that plaintiff is entitled to judgment.

The appeal was therefore allowed with costs here and in the Court below. We also ordered that the action be stayed, since by consent the parties will now submit their dispute to Arbitration. The sum of $505,700.00 shall be refunded to appellants with interest from April 5, 1985, at 8% per annum to date of payment thereof.

We also order refund of the deposit to appellants.

Order accordingly.

Solicitors: *Chong Wai Meng & Van Buerle; Mahinder Singh Dulku & Co.*

(1) NAMASIYIAM (2) RAJINDRAN (3) GOH CHIN PENG, and (4) NG AH KIAT v. PUBLIC PROSECUTOR

[S.C. (Salleh Abas L.P., Wan Suleiman & Syed Agil Barakbah S.C.JJ.) January 5 & 6, and March 31, 1987]

[Kuala Lumpur – Supreme Court Criminal Appeal Nos. 58, 59, 60 & 61 of 1985]

Criminal Law and Procedure – Offence of trafficking in dangerous drug – Whether offence one of doing an act preparatory to the offence of trafficking – Whether there was break in chain of evidence in relation to exhibits – Evidence of agent provocateur – Informer taking active part as accomplice – Not called as witness – Common intention – Evidence Act, 1950, s. 114(g) – Dangerous Drugs Act, 1952, s. 40A(1) – Penal Code, s. 34.

Evidence – Exhibits – Chain of evidence – Agent provocateur – Informer taking active part as accomplice not called as witness – Evidence Act, 1950, s. 114(g).

Dangerous Drugs – Trafficking in heroin – Chain of evidence in relation to exhibits.

The four appellants had been charged under section 39B(1)(c) of the Dangerous Drugs Act 1952 in that in furtherance of the common intention of them all, they did do an act preparatory to trafficking in a dangerous drug, *i.e.* 1,871.6 gms. of heroin and thereby committed an offence punishable under section 39B(2) of the Act read with section 34 of the Penal Code. They were convicted and each sentenced to death. They appealed against their conviction and sentence. The facts showed that the accused were arrested as a result of a trap laid by the police with the assistance of an agent of the Drug Enforcement Administration of the United States and an informer. There were several grounds of appeal raised by each of the appellants but there were two common grounds:

(1) The learned trial Judge erred in law in failing to appreciate the break in the chain of evidence adduced by the prosecution regarding the recovery, safe-keeping, movements and production of the ten packets of heroin (Ex P.5 A-J), the subject-matter of the charge preferred against the appellants and which had raised a serious doubt in the prosecution case that the exhibits seized by the police at the scene of the crime were the very same exhibits which were produced in Court by the prosecution.

2) That the learned Judge erred in law by concluding that the appellants were guilty of trafficking in heroin under section 39B(1)(a) of the Act instead of the offence of doing an act preparatory to the offence of trafficking under sub-section (c) as stated in the charge.

Held: (1) there was sufficient evidence as to the movements of the exhibits adduced by the prosecution in this case and there was no break in the chain of evidence affecting proof as to the identity of the said exhibits;

(2) in this case the learned trial judge in fact found each of the appellants guilty as charged under section 39B(1)(c) of the Dangerous Drugs Act, 1952. He also expressed the view that there was sufficient evidence to find